

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

|                      |   |                          |
|----------------------|---|--------------------------|
| BRADLEY J. CHEWNING, | : |                          |
|                      | : | NO. 1:06-CV-00220        |
| Petitioner,          | : |                          |
|                      | : |                          |
|                      | : | <b>OPINION AND ORDER</b> |
| v.                   | : |                          |
|                      | : |                          |
|                      | : |                          |
| WANZA JACKSON,       | : |                          |
|                      | : |                          |
| Respondent.          | : |                          |

This matter is before the Court on the Report and Recommendation in which the assigned Magistrate Judge recommended that Respondent's motion to dismiss be granted (doc. 7). For the reasons indicated herein, the Court ADOPTS the Magistrate Judge's Report and Recommendation in its entirety, GRANTS Respondent's motion to dismiss (doc. 5) and DENIES WITHOUT PREJUDICE Petitioner's petition for writ of habeas corpus (doc. 1).

On April 17, 2006, pro se Petitioner Bradley Chewning, an inmate at the Warren Correctional Institution in Lebanon, Ohio, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Id.). On August 22, 2006, Respondent filed a motion to dismiss the petition, claiming that it was a "mixed" petition containing both exhausted and unexhausted claims (doc. 5). Petitioner did not file a response.

In his December 15, 2006 Report and Recommendation concerning Respondent's motion to dismiss, the Magistrate Judge

found Respondent's argument well-taken (doc. 7). The Magistrate Judge reviewed Petitioner's post-conviction relief efforts and concluded that one basis of the instant petition remained the subject of litigation in state court, and therefore was "unexhausted" (Id.). The Magistrate Judge noted that "a 'mixed' petition containing both unexhausted claims and exhausted claims that have been fairly presented to the state courts is subject to dismissal without prejudice (or administrative stay) on exhaustion grounds" (Id., citing Rose v. Lundy, 455 U.S. 509, 510, 522 (1982)). The Magistrate Judge found that an administrative stay was unnecessary because the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1)(A) had not begun to run and was currently tolled during the pendency of Petitioner's state post-conviction review (Id.). Therefore, the Magistrate Judge recommended that this petition be dismissed without prejudice, giving Petitioner the option of refile after exhaustion of the currently pending appeal from the state trial court's September 25, 2006 re-sentencing order (Id.). The Court finds the Magistrate Judge's Report and Recommendation well-reasoned, thorough, and correct.

The Parties were served with the Report and Recommendation and were therefore afforded proper notice of the Magistrate Judge's Report and Recommendation required by 28 U.S.C. § 636(b)(1)(C), including that failure to file timely objections to

the Report and Recommendation would result in a waiver of further appeal. See United States v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981). Neither Party filed any objections thereto within the ten days provided for by Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(C).

Having reviewed this matter de novo pursuant to 28 U.S.C. § 636(b), the COURT ADOPTS the Magistrate Judge's Report and Recommendation (doc. 7) in its entirety, and therefore, GRANTS Respondent's motion to dismiss (doc. 5), and DENIES WITHOUT PREJUDICE Petitioner's writ of habeas corpus (doc. 1). Because "jurists of reason would not find it debatable as to whether this Court is correct in its procedural findings" the Court DOES NOT issue a certificate of appealability in this case. Finally, the Court CERTIFIES, pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of this Order would not be taken in "good faith" and therefore DENIES Petitioner leave to appeal in forma pauperis upon a showing of financial necessity.

SO ORDERED.

Dated: February 15, 2007

s/S. Arthur Spiegel  
S. Arthur Spiegel  
United States Senior District Judge